STATE OF MICHIGAN

COURT OF APPEALS

ROBERT W. GAMMAGE,

Plaintiff-Appellant,

v

JORGE CANCHOLA and CYNTHIA CANCHOLA,

Defendants-Appellees.

UNPUBLISHED
September 14, 2004

No. 246133
Wayne Circuit Court
LC No. 02-212582-NO

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right in this slip and fall case involving an icy stairway. We affirm.

On appeal, plaintiff first argues that the trial court improperly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) because the ice on the stairway was not an open and obvious condition. We disagree. This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportatio*n, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra*, 456 Mich 337. When deciding a motion for summary disposition brought under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion may be granted when the proofs show that there is no genuine issue of material fact. *Morales, supra,* 458 Mich 294.

In *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001), the Supreme Court stated the general rule that a landowner has a duty to exercise reasonable care to protect an invitee "from an unreasonable risk of harm caused by a dangerous condition on the land." However, the landowner's duty does not generally include the removal of open and obvious dangers:

> [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. [*Id*. (internal citation and quotation omitted).]

As this Court stated in *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Novotney v Burger King*, 198 Mich App 470, 475; 499 NW2d 379 (1993), the test for an open and obvious danger is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce, supra*, 249 Mich App 238-239, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

In *Joyce* and in *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002), this Court recently applied the above objective test to situations similar to that involved in this case, i.e., to situations involving a slip and fall on an icy, hazardous area. In *Joyce*, determining that the plaintiff was "undoubtedly aware" of the snowy and icy condition of the sidewalk and the danger of slipping before she fell, this Court held that the snowy and icy condition of the sidewalk was open and obvious. *Joyce, supra*, 249 Mich App 239-240. Relying on the analysis and conclusion in *Joyce*, this Court in *Corey* also held that the snowy and icy condition of the steps located outside one of the defendant's dormitories was open and obvious, because the plaintiff was a reasonable person who recognized its danger. *Corey, supra*, 251 Mich App 5-6.

Similar to the holdings in *Joyce* and *Corey*, we find that a reasonable person would be aware of the icy condition of the rear stairway located outside defendants' building. At his deposition, plaintiff testified that, when he ascended them between 11:00 a.m. and 11:30 a.m. on February 13, 2000, he noticed that the steps were wet from water dripping from the roof of the building. He also testified that he noticed snow on the ground when he ascended the steps and that he was aware that the temperature had cooled when he left his friend's apartment and proceeded down the rear stairway between 3:30 p.m. and 4:00 p.m. Given the dripping water and the falling temperatures, a reasonable person in plaintiff's position would have foreseen the danger of slipping and falling on the ice on the stairway. *Joyce, supra*, 249 Mich App 238-239. Therefore, we conclude that the evidence supports the trial court's ruling that the ice on the stairway was an open and obvious condition.

Plaintiff next argues that the trial court improperly granted summary disposition because the ice on the stairway was effectively unavoidable and therefore unreasonably dangerous. We disagree.

The *Lugo* Court held that a landowner is not required to protect an invitee from an open and obvious danger unless "special aspects" of the condition make it unreasonably dangerous. *Lugo, supra*, 464 Mich 517. Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Id.* at 519.

We conclude that that there were no special aspects of the icy stairway that rendered the condition unreasonably dangerous. First, the icy stairway was not "effectively unavoidable" because, instead of using the icy stairway located outside of defendants' building, plaintiff could have left the building by using an interior stairway leading to the front of the building. Although his deposition testimony was somewhat contradictory, plaintiff answered, "Yeah, there had to be," when asked if he know about the alternative stairway. Unlike the example provided in *Lugo*, *supra*, 464 Mich 518, where a customer must walk though water to leave by way of the only exit of a building, plaintiff had a reasonable alternate route for leaving his friend's apartment building and could have avoided descending the icy stairway if he had further investigated the existence and useability of the alternative stairway.

Moreover, pursuant to *Lugo*, *supra*, 464 Mich 518 n 2, liability is not imposed "merely because a particular open and obvious condition has some potential for severe harm." In *Joyce*, this Court, applying *Lugo*, determined that although the plaintiff had indicated she had no choice but to use the slippery sidewalk to the front door, she had in fact presented no evidence to suggest that "the condition was so unreasonably dangerous that it would create a risk of death or severe injury." *Joyce*, *supra*, 249 Mich App 243. Applying *Lugo* and *Joyce*, this Court in *Corey* stated:

> Plaintiff here testified that although he saw the steps and their condition and knew that there was an alternate route into the building that was close by, he nonetheless attempted to use them. Although the steps likely had some potential for severe harm, we have no doubt that these circumstances are not the type of special aspects that *Lugo* contemplated. In this case, the stairway on which plaintiff fell consisted of three steps and was elevated only a couple of feet. Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit. Falling thirty feet presents such a *substantial risk of death or severe injury* . . . that it would be unreasonably dangerous to maintain the condition . . . . Unlike falling an extended distance, it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury or a substantial risk of death. [*Corey*, *supra*, 251 Mich App 6-7 (citations and internal quotations omitted; emphasis added by *Corey*).]

The *Corey* Court therefore concluded that there were no "special aspects" of the steps that created a "uniquely high likelihood of harm or severity of harm." *Id.* at 6.

Just like the plaintiff in *Corey*, plaintiff in this case attempted to descend the rear stairway although the evidence shows that he should have foreseen the icy condition of the stairway and had an alternate route to exit the building. Also, as the *Corey* Court determined, we conclude that falling on the stairway at issue was not the same as falling an extended distance, such as into a thirty-foot-deep pit as mentioned in *Lugo*. *Corey*, *supra*, 251 Mich App 6-7. Arguably, the exterior stairway may have "some potential for severe harm," *Lugo*, *supra*, 464 Mich 518 n 2, but plaintiff failed to show that the stairway presented a reasonably foreseeable and high risk of severe harm or that a typical person falling down the stairway would suffer severe injury. *Id.* at 519-520. Therefore, similar to *Joyce* and *Corey*, we hold that there were no "special aspects" of the stairway creating an unreasonable risk of harm. We therefore conclude that the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter